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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1082

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Petitioners*,

v.

CITY OF CINCINNATI, *Respondent*.

BRIEF OF RESPONDENT, CITY OF CINCINNATI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent City of Cincinnati, hereinafter referred to as the City, joins with the Petitioners in their prayer that a writ of certiorari issue in this case.

PRELIMINARY STATEMENT

It may seem strange that the City, the beneficiary of a damage judgment of $12,000 against the Petitioners, should be supporting them in their attempt to overturn the judgment of the Supreme Court of Ohio. The fact is that that judgment resulted, not from any initiative taken by the City but as the result of the intervention of a citizen over the objection of the City (R. 32, 41). As Petitioners' Statement of the Case shows, the City brought an

injunction action against Council 51 and others (not including the International) on January 4, 1970 to enjoin the defendants from engaging in a strike against the City and a temporary restraining order was issued. Thereafter the City instituted contempt proceedings against Council 51 and various individuals for violation of the temporary restraining order on January 5 and 6, 1970 as a result of which Council 51 and ten individuals were held in contempt, were fined and sentenced to jail, some of the jail sentences being suspended. The strike was settled on Thursday, February 5 by agreement between Council 51 and the City, which provided that the injunction action would be dismissed, the injunction dissolved and that the City and Council 51 would join in a request for the dismissal of all pending contempt proceedings and the remission of all contempt sentences and other penalties (R. 206). This agreement was entered into by the City in good faith and the City has, in good faith, attempted to implement it. The City did in fact join with Council 51 in a motion to the trial court to dismiss the injunction action and otherwise carry out the terms of the settlement agreement (R. 60, 94, 107). These efforts were defeated by the intervention and opposition of the respondent Goldberg whose original intervention was vigorously opposed by the City (R. 32, 41). The Intervenor then instituted new contempt proceedings against the Petitioners and others. At the trial and Court of Appeals levels the City restated its position that it was not interested in recovering damages and that "justice would be better served in accordance with its Memorandum of Settlement with the defendants dated February 5, 1970. - - -". (R. 211-212). And subsequent to the filing of the petition for writ of certiorari in this Court, the City Council adopted a motion requesting the City Solicitor to support Petitioners' position.

It goes without saying that the City did not approve of nor condone the strike nor does it condone the violation of the lawful orders of the Court. However, believing as it does that due process must be afforded in all cases, the City finds merit in the reasons stated in the Petition for granting the writ.

I. THE COURTS BELOW DENIED PETITIONERS DUE PROCESS OF LAW

Although the judgment runs against Petitioners and, in part, in favor of the City, the City, as a governmental entity, has an interest and, indeed, a responsibility to see that due process is observed in litigation to which it is a party and to assure that the City does not obtain a recovery or cause punishment to be imposed unless due process has been granted its adversary. cf. *Berger* v. *United States*, 295 U.S. 78. This public responsibility is no less when the recovery is obtained or punishment imposed in a suit such as this one, in which, in effect, a taxpayer stands in the shoes of the City while the City is also a party to the suit.

It is a fact, as stated by Petitioners, that at no time prior to the decision of the trial judge had there been any intimation by the Court or by counsel for the Intervenor that Petitioners were being tried for multiple contempts. A fair reading of the record makes it clear that none of the parties tried the case on the theory that the defendants were being charged with a separate contempt for each day of the strike. The prejudicial effect of the failure to put the defendants on notice is evidenced by the complete absence of testimony concerning the status of the strike between Thursday, February 5, 1970, when the strike settlement agreement was executed and Monday, February 9, when all of the strikers were back at work. The record shows only that some of the strikers returned to work on Sunday, February 8 and the rest on Monday, February 9

and that all strike activity had ceased as of those dates (R. 140).* Had the City been on notice that the status of the strike between February 5 and February 9 was material, it would have been obligated to inform the Court, if the defendants had failed to do so, that following the execution of the strike settlement agreement on February 5 and even before it was ratified by the Union membership on February 6, the City informed the Union that the employees were to return to work starting with those who were scheduled to report on Sunday night, with the rest reporting on Monday. On this basis there could have been no question but that the strike ended on February 6. The absence of this evidence from the record as a result of the parties' ignorance of its materiality was clearly prejudicial to both Council 51 and the International.

The City supports the Petition herein because of its responsibility as a public body to see that due process of law is observed. The following from the dissenting opinion of Judge Stevens in *Groppi* v. *Leslie*, 436 F.2d 331, 336, is in point:

> "If punishment is to serve as an effective deterrent to repeated or widespread disorder, it is important that the community at large have confidence in the fairness of the proceedings which lead to conviction and sentencing.
>
> "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense

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* Inexplicably, the Ohio Supreme Court affirmed the finding that the defendants were in contempt on both February 8 and 9.

of decency and fair play." Burdeau v. McDowell, 256 U.S. 465, 477, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921) (Brandeis J. dissenting)."

CONCLUSION

For the foregoing reasons respondent City of Cincinnati joins with Petitioners in urging that their Petition for Certiorari be granted.

Respectfully submitted,

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